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EDITORIALS

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J. H. W.

THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.—The American Institute of Criminal Law and Criminology is an outgrowth of the National Conference on Criminal Law and Criminology held in Chicago in June, 1909. The idea of a conference representing the various classes interested in the problems connected with the administration of punitive justice, including the treatment of criminals, was a happy conception of the law faculty of Northwestern University, and the holding of such a conference was adopted as an appropriate way of celebrating the fiftieth anniversary of the foundation of the law school of that institution. It was indeed a unique and fitting method of commemorating an anniversary of this kind, coming as it did at a time when there is an awakening of interest in legal reform and a crying need for co-operative effort among lawyers and scientists. The conference was composed of about one hundred and fifty delegates representing the various professions and occupations concerned directly or indirectly with the administration of the criminal law and the punishment of criminals, and included members of the bench and bar, professors of law in the universities, alienists, criminologists, penologists, superintendents of penal and reformatory institutions, psychologists, police officials, probation officers, and the like. Delegates attended from every section of the country and the conference was a very repre-

sentative gathering of those either actually concerned with the administration of the criminal law or interested in its problems as students and scientists. In character and purpose the conference was entirely without precedent in the history of the United States. It represented the first instance of co-operative effort among those interested in a better system of criminal justice, and marks, we venture to assert, the beginning of a new era in the history of American criminal jurisprudence. The conference afforded an excellent opportunity for the exchange of ideas among lay scientists and lawyers, and a sincere effort was made to reach a common understanding on certain points concerning which there has been a variance of opinion. Although the idea of such a gathering was new to America it is an old one in Europe, where congresses of criminologists have frequently been held for the promotion of criminological science and the consideration of practical problems connected with the administration of criminal justice. In Europe the value of co-operation among lawyers and scientists in promoting improvement in the criminal law and in methods of criminal procedure has long been recognized.

An elaborate program covering almost every problem of criminal science was prepared for the Chicago conference mainly from the list of topics suggested by the delegates, and altogether it constituted a remarkable program of constructive effort looking toward judicial and penal reform. For the systematization and dispatch of the work of the congress the delegates were divided into three sections, to the first of which were referred all topics relating to the treatment (penal and remedial) of criminals; to the second, those relating to the organization, appointment and training of officials concerned with the administration of punitive justice, and to the third, those having to do with criminal law and procedure. To the conference as thus organized one hundred and thirty-five topics were submitted for consideration. They included such questions as the indeterminate sentence, rehabilitation, procedure of juvenile courts, treatment of accused persons under detention, indemnification for wrongful detention, the employment of prisoners, bureaus of identification, probation and parole, the insanity plea, public defenders, the selection and treatment of jurors, means of increasing the effectiveness of the jury system, the unnecessary multiplication of criminal laws, the examination of accused persons, the simplification of pleading, the need of efficient agencies for collecting and publishing criminal and judicial statistics, restrictions on the right

of appeal, reversals for technical errors, enlargement of the power of the judge, the constitution and procedure of municipal courts, laboratories for the scientific study of criminals, the individualization of punishment, the use of medical expert testimony, and many others. Realizing the impossibility of dealing adequately with such a variety of questions the conference wisely decided to restrict its deliberations to the consideration of a small number of topics which are to be made the subjects of investigation by committees and upon which reports are to be presented at the next conference. Among those topics were: (1) an effective system for recording the physical and moral, hereditary and environmental conditions of offenders; (2) the most effective methods of probation and parole for adult offenders; (3) the indeterminate sentence; (4) the organization and training of pardon and parole boards and the correlation of such boards with one another and with the courts; (5) the practicability of establishing commissions of specialists for giving expert testimony; (6) the possibility of unifying state and local courts so as to diminish the cost of transcripts, bills of exception, writs of error, etc., in accordance with the suggestion of the committee of fifteen of the American Bar Association; (7) the simplification of pleading in criminal cases and the elimination of technical errors. A committee was also appointed to investigate and report on the methods of criminal procedure in Europe and particularly in Great Britain, where the administration of justice is frequently asserted to be a model of efficiency and dispatch. Dean John D. Lawson of the University of Missouri School of Law, and editor of the American Law Review, and Professor Edwin R. Keedy of Northwestern University Law School, as members of this committee, are now in England studying British criminal procedure, this mission having been undertaken with the approval and good wishes of President Taft, who is a great admirer of the English system and deeply interested in the outcome of the proposed inquiry. These gentlemen, it is understood will be joined by other members of the committee at an early date and the result of their investigations will be awaited with interest by all those who desire impartial and first-hand information regarding the methods by which the administration of criminal justice in England has been brought to such a high degree of efficiency.

An encouraging feature of the Chicago conference was the practical unanimity among the lawyers and laymen alike that certain of our rules of criminal procedure and penal methods are

antiquated, inadequate and unworthy of the high standard of civilization that we have attained in other respects and should be modified in the interest of justice and social security.

The conference adopted resolutions calling attention to the popular dissatisfaction with the results of our present methods of administering criminal justice; declared that reliable and accurate information regarding the active administration of the criminal law was necessary to efficient legislation and administration; appealed to Congress to provide through the agency of the Census Bureau for the collection of full and accurate criminal and judicial statistics covering the entire country; and urged the enactment of legislation by the states, requiring prosecuting attorneys and magistrates to report to some state officer full information regarding crime committed within their jurisdictions and the punishment of offenders. Recognizing the desirability of making readily accessible in English the more important treatises on criminology published in foreign languages, steps were taken looking toward the translation and publication of such treatises, to the end that the principles of criminal science may be more generally studied and the criminal law improved. Finally, impressed with the advantages of uniting the efforts of lawyers, criminologists, sociologists and all others in the cause of a better criminal law, the conference resolved to effect a permanent national organization, to be known as the American Institute of Criminal Law and Criminology, whose purposes shall be to advance the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith, and to co-ordinate the efforts of individuals and of organizations interested in the administration of certain and speedy justice. Mr. John H. Wigmore of Chicago was elected president of the new organization and it was decided to hold the next meeting at Washington in October, 1910, in connection with the International Prison Association. The proceedings of the Chicago conference will be published for distribution among the members. J. W. G.

PLAN OF THE JOURNAL.—During the sessions of the National Conference on Criminal Law and Criminology at Chicago the fact was brought out that there is no journal or bulletin published in the English language devoted wholly or in part to the cause of criminal law and criminology or to the problems connected therewith, although there are thirty or forty periodicals

of this character published in foreign countries, notably Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Switzerland, and even India and South America.[1] In Germany alone there are not less than twenty journals, bulletins or periodical publications devoted wholly or in part to some phase of criminal jurisprudence, criminology, penology, criminal psychology, psychiatry, or police administration. In France there are at least seven such periodicals, and in Belgium there is one (the *Revue de droit penal et de criminologie*), founded in 1907. In Italy, where the interest in criminal science has long been active and constructive, there are at least a dozen periodical publications devoted to the problems of criminal law, criminology, penology and the allied sciences.

America needs a journal which shall represent all classes of persons whose professional activities or private interests bring them into relation with the administration of the criminal law and who are seeking for modern solutions of some of its most important problems. Very recently there has been a remarkable awakening of interest in the scientific study of crime and penal methods—an interest which is beginning to manifest itself in a productive research and investigation as well as in destructive criticism of antiquated methods and in constructive proposals of reform. Believing that an organ should be provided for promoting this new spirit of research and investigation, the American Institute of Criminal Law and Criminology has undertaken the establishment of this JOURNAL.

It will aim to arouse and extend a wider interest in the study of all questions relating to the administration of the criminal law, including the causes and prevention of crime, methods of criminal procedure and the treatment of criminals; to provide a common medium for recording the results of the best scientific thought and professional practice in this and foreign countries concerning the larger problems of criminal science; to consider the present state of the criminal law in every branch, and to bring to the attention of all who are interested the evidences of progress in legislation and administration so far as it relates to the detection and punishment of crime, criminal procedure, and the punishment of offenders. It will advocate the introduction of such reforms in existing penal methods as experience and reason

[1] A list of these periodicals is published in this issue of the Journal on pp. 163-166.

have shown to be desirable, to the end that a more effective, speedy and inexpensive system of criminal justice may be secured, more modern and effective methods of dealing with criminals may be introduced, and the causes of the present widespread and increasing popular dissatisfaction with the administration of the criminal law may be removed. The JOURNAL will encourage and advocate legislation looking toward the collection and publication of more systematic statistical and descriptive information relating to the causes, nature and punishment of crime, including judicial statistics showing the efficiency of those agencies and instrumentalities charged with the detection and punishment of crime. Finally, the JOURNAL will furnish reviews of recent and current scientific literature in English and foreign languages, dealing with the progress of criminal jurisprudence and penal methods, together with bibliographical and miscellaneous notes of interest to students of the criminal law, criminology and the allied sciences.

It is believed that such a journal will appeal not only to intelligent practitioners who are interested in the progress of a scientific criminal law, but to all persons, public officials and private individuals alike, who are concerned directly or indirectly with the administration of punitive justice, as well as to a large group of scholars who are working in the allied fields of sociology, anthropology, psychology, philanthropy, etc. It is now recognized that all these sciences are more or less closely related to criminal jurisprudence and criminology and that they are capable of throwing a vast amount of much-needed light on many problems of the criminal law. Each is in a sense contributory to the others and at many points their spheres touch and even overlap.

J. W. G.

PROPOSED REFORMS IN FEDERAL PROCEDURE. Theodore Roosevelt was the first president of the United States to make the matter of the law's delay a subject of discussion in his messages to Congress and to recommend legislation for the improvement of federal procedure, with particular reference to the elimination of technicalities. In his message of December, 1906, he suggested the enactment of a law prohibiting reversals and the granting of new trials on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage

of justice. In his message of December, 1907, he dwelt at some length on the evils that have grown up in connection with the administration of the criminal law, the most flagrant of which, he said, were sentimentality and technicality. The remedy for the latter, he went on to say, must come from the legislatures, the courts and the lawyers, while the first must depend for its cure upon the gradual growth of a sound public opinion which shall insist that regard for the law and the demands of reason shall control all other influences and emotions in the jury box. Both of these evils, he declared with evident truth, must be removed or public discontent with the criminal law will continue. In his message of December, 1908, he again returned to the subject saying,

> "It is earnestly to be desired that some method should be devised for doing away with the long delays which now obtain in the administration of justice, and which operate with peculiar severity against persons of small means and favor only the very criminals whom it is most desirable to punish. These long delays in the final decisions of cases make in the aggregate a crying evil, and a remedy should be devised. Much of this intolerable delay is due to improper regard paid to technicalities which are a mere hindrance to justice. In some noted recent cases this over-regard for technicalities has resulted in a striking denial of justice, and flagrant wrong to the body politic."

President Taft, who from his long experience at the bar and on the bench may be presumed to speak with an authority, a knowledge and a depth of conviction which Mr. Roosevelt did not possess, has on a number of occasions recently asserted that the administration of the criminal law in this country is a shame and a reproach to our civilization and that in his judgment the greatest question before the American people to-day is the improvement of our methods of procedure, to the end that a more speedy, certain and inexpensive system of justice may be obtained. In magazine articles and in public speeches Mr. Taft has again and again dwelt upon this question with an earnestness which comes from a deep sense of duty, pointing out in the most convincing manner the sources of the evil and suggesting the remedies that ought to be applied to meet the situation. Before the Virginia Bar Association in August, 1908, and in a public address at Chicago on September 16, 1909, he made this question the principal theme of discussion. In the Chicago speech, in particular, he called attention to the fact that the English procedure, from which we derived our own, has been improved until delays are now practically unknown. "In England," he said,

"the judge controls the trial, controls the lawyers, keeps them to relevant and proper argument, aids the jury in its consideration of the facts, not by direction but by suggestion, and the lawyers are made to feel that they have an obligation not only to their clients but also to the court and to the public at large, not to abuse their office in such a way as to unduly lengthen the trial and unduly to direct the attention of the court and the jury away from the real facts at issue." "A murder case in England," he continued, "will be disposed of in a day or two days that here will take three weeks or a month and no one can say, after an examination of the record in England, that the rights of the defendant have not been preserved and that justice has not been done." A trial in America, the President declared, is a game in which the advantage is with the criminal, and, if he wins, he seems to have the sympathy of a sporting public. Referring to the expense of litigation on account of the employment of lawyers and the payment of costs, a burden which in effect gives the well-to-do litigant an important advantage over the poor man, in violation of the principle of equal justice, he said,

> "What the poor man needs is a prompt decision of his case, and by limiting the appeals in cases involving small amounts of money, so that there shall be a final decision in the lower court, an opportunity is given to the poor litigant to secure a judgment in time to enjoy it, and not after he has exhausted all his resources in litigating to the Supreme Court.
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> "I am a lawyer and admire my profession, but I must admit that we have had too many lawyers in legislating on legal procedure, and they have been prone to think that litigants were made for the purpose of furnishing business to courts and lawyers, and not courts and lawyers for the benefit of the people and litigants."

We must, he said, make it so that the poor man will have as nearly as possible an equal opportunity in litigating with the rich man, but under present conditions, be it said to our shame, this is not the case. Concluding his Chicago speech the President ventured the opinion that the time was now ripe for the appointment of a commission by Congress to take up the question of the law's delays in the federal courts and to report a system which should not only secure quick and cheap justice to litigants in the federal courts, but which would offer a model to the legislators and courts of the states by the use of which they could themselves institute reforms.

In his first annual message to Congress in December, 1909, Mr. Taft gave an important place to a discussion of the need of reform in our court procedure, saying,

"The deplorable delays in the administration of civil and criminal law have received the attention of committees of the American Bar Association and of many state bar associations, as well as the considered thought of judges and jurists. In my judgment, a change in judicial procedure, with a view to reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decision in both civil and criminal cases, constitutes the greatest need in our American institutions. I do not doubt for one moment that much of the lawless violence and cruelty exhibited in lynchings is directly due to the uncertainties and injustice growing out of the delays in trials, judgments and the executions thereof by our courts.

"Of course, these remarks apply quite as well to the administration of justice in state courts as to that in federal courts, and without making invidious distinction, it is perhaps not too much to say that, speaking generally, the defects are less in the federal courts than in the state courts. But they are very great in the federal courts. The expedition with which business is disposed of both on the civil and criminal side of English courts under modern rules of procedure makes the delays in our courts seem archaic and barbarous. The procedure in the federal courts should furnish an example for the state courts."

Referring to the impossibility, in the absence of a constitutional amendment of uniting under one form of action proceedings at common law and equity in the federal courts, he asserted that it was, however, undoubtedly within the power of Congress to simplify and make short and direct the procedure both at law and equity in those courts. Carrying out the suggestion in his Chicago speech in regard to the desirability of an inquiry into the existing methods of procedure with a view to making improvements therein, the President recommended the appointment of a commission with authority to examine the law and equity procedure of the federal courts of first instance, the law of appeals from those courts to the courts of appeals and to the Supreme Court, and the costs imposed in such procedure upon private litigants and upon the public treasury and make recommendations with a view to simplifying and expediting the procedure as far as possible and making it as inexpensive as may be to the litigant of little means. A bill to carry out the latter recommendation is now before the Judiciary Committee of the House of Representatives. It was introduced by Mr. Madison and empowers the President to appoint a commission of five lawyers, of ample experience in the practice of their profession, to prepare and report to the next Congress, at its first regular session, a complete code regulating the procedure in the courts of the United States, and made as nearly uniform in all kinds of causes as is practicable; designed to expedite trials and decisions and allowing reviews by appeal, without any unnecessary formality or

expense, and of such questions as are now reviewable by appeal, writ of error, or certiorari. Another bill, introduced by Representative Parker, chairman of the Judiciary Committee, proposes several modifications of federal procedure with a view to removing certain of the evils complained of by President Taft. This bill was drawn by a committee of the American Bar Association and was under consideration by the association for four years. At the Seattle meeting in August, 1908, it was fully discussed and was, with the exception of section 2, which was referred back to the committee, almost unanimously approved by the Association. In this form it was discussed before the Judiciary Committee at the last Congress and was amended to meet the criticism of certain members of the committee. As thus amended it was reported back to the American Bar Association at its annual meeting in Detroit in 1909 and was approved by the association with but one dissenting vote.

The first section of the bill provides that

"no judgment should be set aside, or reversed, or new trial granted, by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause it shall appear that the error complained of has resulted in a miscarriage of justice."

This provision embodies the exact recommendation of President Roosevelt in his annual message of December, 1906, and is substantially the suggestion made by Mr. Taft in an article published in the Yale Law Journal before his election.[1] Another provision of the bill forbids the issue of writs of error in criminal cases unless a justice of the Supreme Court shall certify that there is probable cause for believing that the defendant was unjustly convicted. The purpose of this provision is to prevent an abuse of the right of appeal, which has often proved a disgrace to the administration of justice both in the federal and the state courts. Under the present law the judge has no discretion and is bound to allow an appeal as a matter of course. A criminal who has been convicted in a state court and has had his conviction affirmed by the highest court of the state may sue out a writ of error from the United States Supreme Court, alleging that a federal question is involved. Although it may be clear that no such question is involved and that the purpose is only to

[1]Vol. XV, p. 1.

cause delay the judge is, as has been said, bound to allow the writ; the result being that justice is delayed and frequently defeated. The proposed amendment makes it incumbent upon the appellant or plaintiff in error to satisfy a justice of the Supreme Court that he has been unjustly convicted, otherwise the appeal will not be allowed, the idea being that if he cannot convince one of the justices of probable cause there is no reason to believe that he could satisfy the whole court.

Another proposed amendment prohibits appeals to the Supreme Court in habeas corpus proceedings unless a justice of that court shall certify that there is probable cause for believing that the petitioner is unjustly deprived of his liberty. The evil which it is aimed to eliminate by this amendment and the proposed remedy are substantially the same as those of the preceding provision. In short, it is intended to prohibit the suing out of writs of habeas corpus when one of the justices cannot be satisfied that a federal question is involved and, like the preceding provision, will remove a source of unnecessary delay and thus tend to secure promptness and certainty of punishment where it is deserved. Still another provision permits appeals and writs of error to be taken from the District Courts to the Circuit Courts of Appeal in cases of conviction of an infamous crime, instead of to the Supreme Court, as is now allowed. If we understand the meaning of the proposed amendment its effect will be to make the decision of the Circuit Court of Appeals final in all criminal cases, even those which are capital. Under the present practice writs of error in capital cases may be taken to the Supreme Court and in nearly every such case the privilege of finally resorting to this tribunal is availed of, with the result that justice is not only delayed, but the burden of being compelled to review nearly every capital case in which there has been a conviction in a federal court interferes with the discharge by the Supreme Court of its larger national duties to the country as a whole.

The most important of the reforms proposed by the American Bar Association bill, however, is that which relates to reversals for technical errors. The principle of the proposed rule is, of course, not new to Anglo-American procedure. It has in fact been a rule of English procedure for more than a quarter of a century and has given entire satisfaction in that country. Mr. Everett P. Wheeler of the New York Bar, at a hearing given by the House Judiciary Committee on January 12, last, speaking of the effect of this rule in diminishing the number of reversals

in England, testified that "the entire number of reversals in the last two or three years in proportion to the number of appeals has not exceeded 20 per cent. And where reversals occur final judgment is usually entered. There is seldom occasion for a new trial. In 1907 there were 197 reversals in the English Supreme Court of Judicature. In only nine of these were new trials ordered. The theory of the whole system is that the trial in the first instance shall settle the facts of the case; that you shall take a verdict from the jury on every contested question of fact, and have it understood by all that the first trial is *the* trial; that when the evidence is fresh in the minds of witnesses, and the witnesses are all available, their evidence shall be presented to the jury, and the verdict rendered upon that shall become a part of the record and it shall be for the court thereafter to determine what the law is and how it shall be applied upon that state of facts." The English rule on this point has also lately been introduced into the procedure of several of the American states. Thus the code of criminal procedure of New York enacts that judgment shall be given without regard to technical errors or exceptions which do not affect the substantial rights of the parties. The Pennsylvania Code also contains a similar provision, though according to the testimony of a prominent member of the Philadelphia Bar it has been observed in but one case during the last three years. The rule is also in force in Massachusetts and New Hampshire and has recently been incorporated into the procedure of Wisconsin. The same principle was also incorporated in the act creating the municipal court of Chicago. This act declares that no order or judgment of the municipal court shall be reversed by the Appellate Court or the Supreme Court unless they shall be satisfied that the order or judgment was contrary to law and the evidence or resulted from substantial errors directly affecting the matters at issue. Moreover, the Appellate Court is empowered to enter such order or judgment as in its opinion the municipal court ought to have entered, instead of sending the case back for retrial.

No good reason appears to us why this sensible rule of procedure should not be strictly followed by every court of review in the land, whether federal or state. Some of the actual instances of reversal for error by the state courts, put in evidence before the Judiciary Committee of the House of Representatives at its hearing on January 12, are simply shocking and would not be

tolerated anywhere outside of the United States. And they are not confined to the procedure of the United States, as was pointed out by Judge Moon, a member of the Judiciary Committee, who asserted that federal procedure is about as archaic and as far behind the times as that of any of the states. (Hearings, p. 37.)

The present practice, by which common sense is often sacrificed to technicality, substance to form, and justice to injustice, cannot be reconciled with the sensible rule once laid down by Chief Justice Marshall that "It is desirable to terminate every case upon its real merits if these merits are fairly before the court, and to put an end to litigation where it is in the power of the court so to do." (Church vs. Hubbart, 2 Cranch, 232.) No honest judge would dispute the soundness of this rule, not even those who allow new trials for the pettiest of errors, yet, in practice, they are constantly violating the rule, to the discredit of the judiciary, the promotion of litigation, the defeat of justice and the encouragement of lawlessness. We need, above all, a change of attitude upon the part of the bench and bar in regard to the fundamental purposes of a system of criminal justice and of the right of society to be protected from the criminal class. The law schools should train those who are to fill the ranks of the legal profession to look with contempt upon every attempt to sacrifice substantial justice to technicality. Speaking on this point before the Judiciary Committee at its hearing on January 12, Dean Lawson, of the University of Missouri Law School, remarked:

"In every other branch of science—and we must treat law as a science—the teachers are teaching the science of to-day, wherever it may come from. We are teaching, or have to teach, the legal science of the days of the Tudors, of the early ages, when it comes to the administration of the criminal law. If in other professions and businesses things had gone as badly as they have in the legal profession—and I think it is a great reproach to the lawyers—we would still, instead of using the Hoe press, be using the old press run by hand, and instead of going by great railroads from one end of the continent to the other, we would still be using the stage-coach; and it is one of the most peculiar things that the lawyers seem not to have noticed that in matters of legal practice we are, in most of the Western states, where we were and where England, from which we took our practice, was, over a century ago. But the best thing that can be said to-day is that the lawyers are getting to recognize the necessity."

The bill now before Congress ought to pass without opposition. It has the approval of the best lawyers of the country and the wisdom of the reform which it proposes to introduce has been

demonstrated beyond all question by the experience of England and the few American states where it has been tried. It does not take away from the accused any right to which he is justly entitled, but is designed simply to eliminate unnecessary delays which often result in the defeat of justice. As President Taft has well remarked, it is the duty of the United States to take the lead and adopt a system of procedure which will serve as a model for the states to follow. The opportunity to make an important beginning is now squarely before Congress and we hope it will have the good sense and patriotism to take advantage of it.

J. W. G.

THE RECENT DECISION OF THE ILLINOIS SUPREME COURT ON THE PAROLE LAW.—The decision of the Illinois Supreme Court in People vs. Joyce, handed down February 16, 1910, and reported in 40 Natl. Corp. Repr. 48, in which the court overthrew the entire Parole Law of 1899, has created no small degree of consternation among lawyers, criminologists, and, indeed, all members of the community. This law is the one under which the great majority of those convicted of infamous crimes during the last ten years have been sentenced, and while the opinion of the court in defeating the law of 1899 at the same time revives the earlier act of 1895, as amended in 1897, and authorizes a resentencing of convicts under the earlier acts without the necessity of a retrial, the decision, nevertheless, if it stands, seems likely to give rise to numerous questions of great difficulty and embarrassment and not improbably to open the prison doors to many who are serving sentences justly imposed for crimes committed. The subsequent action of the court in allowing a rehearing in the case and staying proceedings therein has afforded some ground for hope that the court may ultimately change its ruling, and sustain the essential provisions of the law of 1899.

So far as the fundamental principles of the parole system are concerned, the opinion of the court seems unimportant. There is no intimation that those principles are necessarily incompatible with the provisions of the State Constitution. The court had already, in the case of George vs. The People, 167 Ill. 447, sustained the constitutionality of the former parole law. The latter case in no way shakes the authority of the earlier one. In fact, the later case, in overthrowing the parole law of 1899, expressly holds the former parole law to be revived and in full force and

effect. The decision, then, clearly deals no blow to the essential principles of the parole system.

The actual decision of the court proceeds upon extremely technical lines. The State Constitution provides that no Act shall embrace more than one subject, and that that subject shall be expressed in its title. It also provides that bills making appropriations for the salaries of officers of the government shall contain no provision on any other subject. The title of the Parole Law of 1899 was, "An Act to revise the law in relation to the sentence and commitment of persons convicted of crime and providing for a system of parole, and to provide compensation for the officers of said system of parole." The act contained provisions as to the various matters mentioned in the title. It provided for indeterminate sentences, for release of prisoners on parole, and for their discharge, and it appropriated money to pay the salaries of the parole officers. The act was attacked as embracing more than one subject, and therefore violating the constitutional provision above referred to. The court, however, denied this contention. It held that the Act embraced only one main subject, i. e., the establishment of a parole system, and that the other provisions were connected with, and properly incidental to, this main subject, and that the Act therefore embraced only one subject and not three separate subjects.

The court, however, held the entire act was made unconstitutional by the two sections contained in it making appropriations for salaries. It held that these sections could not be rejected and the rest of the act sustained, notwithstanding the fact that the court had already declared the main purpose of the act to be the establishment of a parole system, and notwithstanding the fact that the Act would be left a perfect and complete law for the accomplishment of this main purpose, with the incidental provision for salaries stricken out. A previous case (Matthews vs. People, 202 Ill. 389, 410), where it was said that similarly unconstitutional provisions for appropriations might be rejected from an act, and the rest of the act sustained, was distinguished, because in the former case the title of the act was silent on the subject of the appropriation, while in the Parole Law the subject of appropriation is made a part of the title. The court says that since the title includes both the subject of the parole system and the appropriation for the salaries, and under the Constitution both cannot stand together in one bill, the court cannot "make

a choice," and retain the parole system part of the Act and reject the appropriation part.

This position of the court has created great astonishment among lawyers. It is settled law that though an act contains unconstitutional provisions, if these are merely incidental to the main purpose of the act, and can be separated from the rest of the act, and rejected, and still leave the remainder an effective law for the accomplishment of the main purposes for which it was enacted, the unconstitutional part will be rejected, and the rest of the act sustained. This process of rejection is in every case subject to the theoretical objection that the expressed intent of the Legislature is departed from, and that that body might not have been willing to pass the retained portions of the act except in connection with the rejected part, on the supposition that the entire act was in all its parts a valid and enforceable law. In other words, the process of rejection of a part only of an act implies a judgment by the court as to what the Legislative intent would be in the emergency created by the partial unconstitutionality of the act. It is therefore no argument against rejection that the court must "make a choice." It must necessarily do so in all cases of this character. It must, in all cases of this kind, decide whether if the alternative of no act at all, or of an act shorn of the unconstitutional features, were presented to the Legislature it would choose the latter alternative. In the case of the Parole Act the presumption in favor of a Legislative choice of the partial act rather than of no act at all, would seem extraordinarily clear. To suppose that the Legislature would not have passed the parole system part of the law unless it could also in the same act pass the appropriation provision (though it could provide for the appropriation just as well in an independent act), would be to impute to the Legislature a degree of imbecility which its severest critics have never charged against it.

The fact that the title includes the subject of appropriations seems to be no reason for distinguishing this case from former cases where it has been said that the appropriation provisions of acts might be rejected and the rest sustained. The court says it cannot choose between the different subjects included in the title. But the court decided that the main purpose of the act was the parole system and the other provisions of the act subordinate to this main purpose. If this is true of the body of the act, it is equally true of the title. Then, if the court would reject the

separate and incidental provision for appropriation in the absence of any mention of this subject in the title, why should a mention of it in the title make it any the less separate and incidental and capable of rejection? Let us see what the choice was, which was presented to the court, and which it professed itself unable to make. It was a choice between the two subjects of the title, the parole system and the appropriation. But clearly the court could not choose the appropriation part of the act and reject the parole system part. That would leave an appropriation with nothing to appropriate for. So really the only possible choice among the subjects mentioned in the title was a choice in favor of the parole system part of the act. From every point of view, the action of the court in defeating the entire act instead of merely rejecting the appropriation provisions seems contrary to the court's prior decisions and to sound reason; and it is to be hoped that it will upon rehearing revise its judgment in this respect.

The overthrown parole law provided for the discharge of prisoners by the Board of Pardons, and prisoners were sentenced to remain confined until so discharged (but not exceeding the maximum term fixed by law for the crime). This provision was attacked as giving judicial powers to the Board of Pardons, but the court found it unnecessary to pass upon the question, the act being held invalid upon the ground above referred to.

The indeterminate sentence feature of the act was attacked in People vs. Deluce, 237 Ill. 541, on the ground that the sentence under the act was not made proportionate to the offense. The court says: "This court fully considered the constitutionality of this act on the matters involved in People vs. State Reformatory, 148 Ill. 413, and People vs. George, 167 Ill. 447. These decisions fully cover all the points raised in the briefs. We see no reason to change or add to what we there stated." In view of this language, it is a little surprising to find the court referring to the constitutionality of the indeterminate sentence provisions of the Parole Act, as a matter upon which it does not decide, and which it apparently considers as open to question. It would seem that the constitutionality of these provisions was fully established by prior decisions of the court. Similar provisions have been sustained generally in other states. Miller vs. State, 149 Ind. 607; Commonwealth vs. Brown, 167 Mass. 144; Attorney General vs. Peters, 43 Ohio St. 629; People vs. Warden of Sing Sing Prison, 39 Misc. (N. Y.) 113, *Ex parte* Howard, 72 Kan. 273; The State vs. Page, 60 Kan. 664. L. E. G.

ANGLO-AMERICAN PHILOSOPHIES OF PENAL LAW.[1]

I. Thomas Hill Green.[2]

176. (3) We come now to the third of the questions raised in regard to the individual's right to free life,—the question under what conditions that right may be forfeited; the question, in other words, of the state's right of punishment. The right (i. e., the power secured by social recognition) of free life in every man rests on the assumed capacity in every man of free action contributory to social good, ("free" in the sense of determined by the idea of a common good. Animals may and do contribute to the good of man, but not thus "freely"). This right on the part of associated men implies the right on their part to prevent such actions as interfere with the possibility of free action contributory to social good. This constitutes the right of punishment,—the right so far to use force upon a person (to treat him as an animal or a thing) as may be necessary to save others from this interference.

177. Under what conditions a person needs to be thus dealt with, what particular actions on his part constitute such an interference, is a question which can only be answered when we have considered what powers in particular need to be secured to individuals or to officials in order to the possibility of free action of the kind described. Every such power is a right of which the violation, if intended as a violation of a right, requires a punishment, of which the kind and amount must depend on

[1]In this series of articles will be presented, from time to time, representative passages from the writings of those English and American thinkers who have advanced a philosophy of penal law. Only those thinkers will be selected who stand eminent in philosophical science and have treated penal law as a part of their general philosophical system.

The series will be edited by Mr. Longwell, instructor in philosophy, Mr. Kocourek, lecturer on jurisprudence, and Mr. Wigmore, professor of law in Northwestern University.

[2]Born, 1836; died, 1882. Professor of Moral Philosophy at Oxford University (Balliol College). He was the leading exponent at Oxford of the principles of Kant and Hegel. His writings were critically adverse to the empiric and utilitarian philosophies. His style is one of the most lucid, simple and convincing in English literature in this field.

The extract here given forms Chapter L in his "Principles of Political Obligation," which is virtually a philosophy of politics and law. It is found on p. 486 ff, vol. II, of his works (ed. Nettleship, 1885-1888, London, Longmans, Green & Co.).

the relative importance of the right and of the extent to which its general exercise is threatened. Thus every theory of rights in detail must be followed by, or indeed implies, a corresponding theory of punishment in detail, a theory which considers what particular acts are punishable, and how they should be punished. The latter cannot precede the former: all that can be done here is further to consider what general rules of punishment are implied in the principle on which we hold all right of punishment to rest, and how far in the actual practice of punishment that principle has been realized.

178. It is commonly asked whether punishment according to its proper nature is retributive or preventive or reformatory. The true answer is that it is and should be all three. The statement, however, that the pnishment of the criminal by the state is retributive, though true in a sense that will be explained directly, yet so readily lends itself to a misunderstanding, that it is perhaps best avoided. It is not true in the sense that in legal punishment as it should be there survives any element of private vengeance, of the desire on the part of the individual who has received a hurt from another to inflict an equivalent hurt in return. It is true that the beginning of punishment by the state first appears in the form of a regulation of private vengeance, but it is not therefore to be supposed that punishment by the state is in any way a continuation of private vengeance. It is the essence of the former to suppress and supersede the latter, but it only does so gradually, just as rights in actuality are only formed gradually. Private vengeance belongs to the state of things in which rights are not as yet actualized; in the sense that the powers which it is for the social good that a man should be allowed to exercise, are not yet secured to him by society. In proportion as they are actualized, the exercise of private vengeance must cease. A *right* of private vengeance is an impossibility; for, just so far as the vengeance is private, the individual in executing it is exercising a power not derived from society nor regulated by reference to social good, and such a power is not a right. Hence the view commonly taken by writers of the seventeenth and eighteenth centuries implies an entire misconception of the nature of a right; the view, viz., that there first existed rights of self-defense and self-vindication on the part of

individuals in a state of nature, and that these came to be devolved on a power representing all individuals, so that the state's right of using force against those men who use or threaten force against other men, is merely the sum or equivalent of the private rights which individuals would severally possess if there were no public equivalent for them. This is to suppose that to have been a right which in truth, under the supposed conditions, would merely have been animal impulse and power, and public right (which is a pleonasm, for all right is public) to have resulted from the combination of these animal impulses and powers; it is to suppose that from a state of things in which "homo homini lupus," by mere combination of wolfish impulses, there could result the state of things in which "homo homini deus."

179. In a state of things in which private vengeance for hurt inflicted was the universal practice, there could be no rights at all. In the most primitive society in which rights can exist, it must at least within the limits of the family be suppressed by that authority of the family or its head which first constitutes rights. In such a society it is only on the members of another family that a man may retaliate at pleasure a wrong done to him, and then the vengeance is not, strictly speaking, taken by individual upon individual, though individuals may be severally the agent and patient of it, but by family upon family. Just because there is as yet no idea of a state independent of ties of birth, much less of a universal society from relation to which a man derives rights, there is no idea of rights attaching to him as a citizen or as a man, but only as a member of a family. That social right, which is at once a right of society over the individual, and a right which society communicates and secures to the individual, appears, so far, only as a control exercised by the family over its members in their dealings with each other, as an authorization which it gives them in prosecuting their quarrels with members of another family, and at the same time to a certain extent as a limitation on the manner in which feuds between families may be carried on, a limitation generally dependent on some religious authority equally recognized by the families at feud.

180. From this state of things it is a long step to the régime of law in a duly constituted state. Under it the arm of

the state alone is the organ through which force may be exercised on the individual; the individual is prohibited from averting violence by violence, except so far as is necessary for the immediate protection of life, and altogether from avenging wrong done to him, on the understanding that the society, of which he is an organ, and from which he derives his rights, being injured in every injury to him, duly protects him against injury, and when it fails to prevent such injury from being done, inflicts such punishment on the offender as is necessary for future protection. But the process from the one state of things to the other, though a long one, consists in the further development of that social right[3] which, properly speaking, was the only right the individual ever had, and from the first, or ever since a permanent family tie existed, was present as a qualifying and restraining element in the exercise of private vengeance so far as that exercise partook at all in the nature of a right. The process is not a continuance of private vengeance under altered forms, but a gradual suppression of it by the fuller realization of the higher principle which all along controlled it.

181. But it will be asked, how upon this view of the nature of punishment as inflicted by the state it can be considered retributory. If no private vengeance, no vengeance of the injured individual, is involved in punishment, there can be no vengeance in it at all. The conception of vengeance is quite inappropriate to the action of society or the state on the criminal. The state cannot be supposed capable of vindictive passion. Nor, if the essence of crime is a wrong done to society, does it admit of retaliation upon the person committing it. A hurt done to an individual can be requited by the infliction of a like hurt upon the person who has done it; but no equivalent of wrong done to society can be paid back to the doer of it.

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[3] "Social right," i. e., right belonging to a society of persons recognizing a common good, and belonging through membership of the society to the several persons constituting it. The society to which the right belongs is, in principle or possibility, a society of all men as rendered capable of free intercourse with each other by the organization of the state. Actually at first it is only this or that family; then some association of families; finally the state, as including all other forms of association, reconciling the rights which arise out of them, and thus the most perfect medium through which the individual can contribute to the good of mankind and mankind to his.

182. It is true that there is such a thing as a national desire for revenge[4] (France and Germany); and if a state = a nation organized in a certain way, why should it not be "capable of vindictive passion"? No doubt there is a unity of feeling among the members of a nation which makes them feel any loss of strength, real or apparent, sustained by the nation in its corporate character, as a hurt or disgrace to themselves, which they instinctively desire to revenge. The corporate feeling is so strong that individuals feel themselves severally hurt in the supposed hurt of the nation. But when it is said that a crime is an offense against the state, it is not meant that the body of persons forming the nation feel any hurt in the sense in which the person robbed or wounded does, such a hurt as excites a natural desire for revenge. What is meant is that there is a violation of a system of rights which the nation has, no doubt, an interest in maintaining, but a purely social interest, quite different from the egoistic interest of the individual of which the desire for vengeance is a form. A nation is capable of vindictive feeling, but not so a nation as acting through the medium of a settled, impartial, general law for the maintenance of rights, and that is what we mean when we talk of the state as that against which crimes are committed and which punishes them.

183. It is true that when a crime of a certain sort, e. g., a cold-blooded murder, has been committed, a popular sympathy with the sufferer is excited, which expresses itself in the wish to "serve out" the murderer. This has some resemblance to the desire for personal revenge, but is really quite different, because not egoistic. Indignation against wrong done to another has nothing in common with a desire to revenge a wrong done to oneself. It borrows the language of private revenge, just as the love of God borrows the language of sensuous affection. Such indignation is inseparable from the interest in social well-being, and along with it is the chief agent in the establishment and maintenance of legal punishment. Law, indeed, is necessarily general, while indignation is particular in its reference; and accordingly the treatment of any particular crime, so far as determined by law, cannot correspond with the indignation which

[4] "Happy shall be he that rewardeth thee as thou hast served us."

the crime excites; but the law merely determines the general category under which the crime falls, and fixes certain limits to the punishment that may be inflicted under that category. Within those limits discretion is left to the judge as to the sentence that he passes, and his sentence is in part influenced by the sort of indignation which in the given state of public sentiment the crime is calculated to excite; though generally much more by his opinion as to the amount of terror required for the prevention of prevalent crime. Now what is it in punishment that this indignation demands? If not the sole foundation of public punishment, it is yet inseparable from that public interest, on which the system of rights, with the corresponding system of punishments protective of rights, depends. In whatever sense then this indignation demands retribution in punishment, in that sense retribution would seem to be a necessary element in punishment. It demands retribution in the sense of demanding that the criminal should have his due, should be dealt with according to his deserts, should be punished justly.

184. This is quite a different thing from an equivalence between the amount of suffering inflicted by the criminal and that which he sustains in punishment. The amount of suffering which is caused by any crime is really as incalculable as that which the criminal endures in punishment, whatever the punishment. It is only in the case of death for murder that there is any appearance of equivalence between the two sufferings, and in this case the appearance is quite superficial. The suffering involved in death depends almost entirely on the circumstances, which are absolutely different in the case of the murdered man and in that of the man executed for murder. When a man is imprisoned with hard labor for robbery, there is not even an appearance of equivalence of suffering between the crime and the punishment. In what then does the justice of a punishment, or its correspondence with the criminal's deserts. consist? It will not do to say that these terms merely represent the result of an association of ideas between a crime and the penalty which we are accustomed to see inflicted on it; that society has come to attach certain penalties to certain actions as a result of the experience (1) of suffering and loss caused by those acts, and (2) of the kind of suffering of which the expectation will deter men

from doing them; and that these penalties having become customary, the onlookers and the criminal himself, when one of them is inflicted, feel that he has got what was to be expected, and call it his due or desert or a just punishment. If this were the true account of the matter, there would be nothing to explain the difference between the emotion excited by the spectacle of a just punishment inflicted, or the demand that it should be inflicted, on the one side, and on the other that excited by the sight of physical suffering, following according to the usual course of things upon a physical combination of circumstances, or the expectation that such suffering will follow. If it is said that the difference is explained by the fact that in the one case both the antecedent (the criminal act) and the consequent represent voluntary human agency, while in the other they do not, we reply, just so, but for that reason the conception of a punishment as just differs wholly from any conception of it that could result either from its being customary, or from the infliction of such punishment having been commonly found a means for protecting us against hurt.

185. The idea of punishment implies on the side of the person punished at once a capacity for determination by the conception of a common or public good, or, in other words, a practical understanding of the nature of rights as founded on relations to such public good, and an actual violation of a right or omission to fulfill an obligation, the right or obligation being one of which the agent might have been aware and the violation or omission one which he might have prevented. On the side of the authority punishing, it implies equally a conception of right founded on relation to public good, and one which, unlike that on the part of the criminal, is realized in act; a conception of which the punitive act, as founded on a consideration of what is necessary for the maintenance of rights, is the logical expression. A punishment is unjust if either element is absent; if either the act punished is not a violation of known rights or an omission to fulfill known obligations of a kind which the agent might have prevented, or the punishment is one that is not required for the maintenance of rights, or (which comes to the same thing), if the ostensible rights for the maintenance of which the punishment is required are not real rights, are not liberties of action or acquisition which there is any real public interest in maintaining.

186. When the specified conditions of just punishment are fulfilled, the person punished himself recognizes it as just, as his due or desert, and it is so recognized by the onlooker who thinks himself into the situation. The criminal, being susceptible to the idea of public good, and through it to the idea of rights, though this idea has not been strong enough to regulate his actions, sees in the punishment its natural expression. He sees that the punishment is his own act and returning on himself, in the sense that it is the necessary outcome of his act in a society governed by the conception of rights, a conception which he appreciates and to which he does involuntary reverence.

It is the outcome of his act, or his act returning upon himself, in a different way from that in which a man's act returns on himself when, having misused his body, he is visited according to physical necessity by painful consequences. The cause of the suffering which the act entails in the one case is the relation of the act to a society governed by the conception of rights; in the other it is not. For that reason, the painful consequence of the act to the doer in the one case is, in the other is not, properly a punishment. We do indeed commonly speak of the painful consequences of imprudent or immoral acts ("immoral" as distinct from "illegal") as a punishment of them, but this is either metaphorically or because we think of the course of the world as regulated by a divine sovereign, whom we conceive as a maintainer of rights like the sovereign of a state. We may think of it as divinely regulated, and so regulated with a view to the realization of moral good, but we shall still not be warranted in speaking of the sufferings which follow in the course of nature upon certain kinds of conduct as punishments, according to the distinctive sense in which crime is punished, unless we suppose the maintenance of rights to be the object of the moral government of the world,—which is to put the cart before the horse; for, as we have seen, rights are relative to morality, not morality to rights (the ground on which certain liberties of action and acquisition should be guaranteed as rights being that they are conditions of the moral perfection of society).

While there would be reason, then, as against those who say that the punishment of crime is merely preventive, in saying that it is also retributive, if the needed correction of the "merely

preventive" doctrine could not be more accurately stated, it would seem that the truth can be more accurately stated by the proposition that punishment is not justified unless it is just, and that it is not just unless the act punished is an intentional violation of real right or neglect of real obligation which the agent could have avoided (i. e., unless the agent knowingly and by intentional act interferes with some freedom of action or acquisition which there is a public interest in maintaining), and unless the future maintenance of rights requires that the criminal be dealt with as he is in the punishment.[5]

187. It is clear, however, that this requirement, that punishment of crime should be just, may be covered by the statement that in its proper nature it is preventive, if the nature of that which is to be prevented by it is sufficiently defined. Its proper function is, in the interest of rights that are genuine (in the sense explained), to prevent actions of the kind described by associating in the mind of every possible doer of them a certain terror with the contemplation of the act,—such terror as is necessary on the whole to protect the rights threatened by such action. The whipping of an ill-behaved dog is preventive, but not preventive in the sense in which the punishment of crime is so, because (1) the dog's ill conduct is not an intentional violation of a right or neglect of a known obligation, the dog having no conception of right or obligation, and (2) for the same reason the whipping does not lead to the association of terror in the minds of other dogs with the violation of rights and neglect of obligations. To shoot men down who resist a successful *coup d'état* may be effectually preventive of further resistance to the government established by the *coup d'état*, but it does not satisfy the true idea of punishment, because the terror produced by the massacre is not necessary for the protection of genuine rights, rights founded on public interest. To hang men for sheep-stealing, again, does not satisfy the idea; because, though it is a genuine right that sheep-stealing violates, in a society where there was any decent reconciliation of rights no such terror as is

[5]The conceptions of the just and of justice implied in this statement of the conditions of just punishment may be expressed briefly as follows: "The just" = that complex of social conditions which for each individual is necessary to enable him to realize his capacity of contributing to social good. "Justice" is the habit of mind which leads us to respect those conditions in dealing with others,—not to interfere with them so far as they already exist, and to bring them into existence so far as they are not found in existence.

caused by the punishment of death would be required for the protection of the right. It is because the theory that punishment is "merely preventive" favors the notion that the repetition of any action which any sufficient body of men find inconvenient may justifiably be prevented by any sort of terror that may be convenient for the purpose, that it requires to be guarded by substituting for the qualifying "merely" a statement of what it is which the justifiable punishment prevents and why it prevents it.

188. But does our theory, after all has been said about the wrongness of punishment that is not just, afford any standard for the apportionment of just punishment, any criterion of the amount of interference with a criminal's personal rights that is appropriate to his crime, except such as is afforded by a prevalent impression among men as to what is necessary for their security? Can we construe it so as to afford such a criterion, without at the same time condemning a great deal of punishment which yet society could be never brought to dispense with? Does it really admit of being applied at all in the presence of the admitted impossibility of ascertaining the degree of moral guilt of criminals, as depending on their state of character or habitual motives? How, according to it, can we justify punishments inflicted in the case of "culpable negligence," e. g., when an engine-driver, by careless driving, for which we think very little the worse of him, is the occasion of a bad accident, and is heavily punished in consequence?

189. It is true that there can be no *a priori* criterion of just punishment, except of an abstract and negative kind. We may say that no punishment is just, unless the rights which it serves to protect are powers on the part of individuals or corporations of which the general maintenance is necessary to the well-being of society on the whole, and unless the terror which the punishment is calculated to inspire is necessary for their maintenance. For a positive and detailed criterion of just punishment, we must wait till a system of rights has been established in which the claims of all men, as founded on their capacities for contributing to social well-being, are perfectly harmonized, and till experience has shown the degree and kind of terror with which men must be affected in order to the suppression of the anti-social tendencies which might lead to the violation of such a system of rights. And this is perhaps equivalent to saying that no complete criterion of just punishment can be arrived

at till punishment is no longer necessary; for the state of things supposed could scarcely be realized without bringing with it an extinction of the tendencies which state-punishment is needed to suppress. Meanwhile there is no method of approximation to justice in punishment but that which consists in gradually making the system of established rights just, i. e., in harmonizing the true claims of all men, and in discovering by experience the really efficient means of restraining tendencies to violation of rights. An intentional violation of a right must be punished, whether the right violated is one that should be a right or not, on the principle that social well-being suffers more from violation of any established right, whatever the nature of the right, than from the establishment as a right of a power which should not be so established; and it can only be punished in the way which for the time is thought most efficient by the maintainers of law for protecting the right in question by associating terror with its violation. This, however, does not alter the moral duty, on the part of the society authorizing the punishment, to make its punishments just by making the system of rights which it maintains just. The justice of the punishment depends on the justice of the general system of rights; not merely on the propriety with reference to social well-being of maintaining this or that particular right which the crime punished violates, but on the question whether the social organization in which a criminal has lived and acted is one that has given him a fair chance of not being a criminal.

190. We are apt to think that the justice of a punishment depends on some sort of equality between its magnitude and that of the crime punished, but this notion arises from a confusion of punishment as inflicted by the state for a wrong done to society with compensation to the individual for damage done him. Neither a crime nor its punishment admits of strictly quantitative measurement. It may be said, indeed, that the greater the crime the heavier should be its punishment, but this is only true if by the "heavier punishment" is understood that with which most terror is associated in the popular imagination, and if the conception of the "greater crime" is taken on the one hand to exclude any estimation of the degree of moral guilt, and, on the other hand, to be determined by an estimate not only of the importance in the social system of the right violated by the crime, but of the amount of terror that needs to be associated with the

crime in the general apprehension in order to its prevention. But when its terms are thus understood, the statement that the greater the crime the heavier should be its punishment, becomes an identical proposition. It amounts to this, that the crime which requires most terror to be associated with it in order to its prevention should have most terror thus associated with it.

191. But why do the terms "heavier punishment" and "greater crime" need to be thus understood? Why should not the "greater crime" be understood to mean the crime implying most moral wickedness, or partly this, partly the crime which violates the more important kind of right? Why should a consideration of the amount of terror that needs to be associated with it in order to its prevention enter into the determination of the "greater crime" at all? Why again should not the "heavier punishment" mean simply that in which the person punished actually suffers most pain? Why should it be taken to mean that with which most terror is associated upon the contemplation? In short, is not the proposition in question at once true and significant in the sense that the crime which implies the most moral depravity, or violates the most important right (such as the right to life), or which does both, should be visited with the punishment that involves most pain to the sufferer?

192. The answer is: As regards heaviness of punishment, it is not in the power of the state to regulate the amount of pain which it causes to the person whom it punishes. If it could only punish justly by making this pain proportionate in each case to the depravity implied in the crime, it could not punish justly at all. The amount of pain which any kind of punishment causes to the particular person depends on his temperament and circumstances, which neither the state nor its agent, the judge, can ascertain. But if it could be ascertained, and if (which is equally impossible) the amount of depravity implied in each particular crime could be ascertained likewise in order to make the pain of the punishment proportionate to the depravity, a different punishment would have to be inflicted in each case according to the temperament and circumstances of the criminal. There would be an end to all general rules of punishment.

193. In truth, however, the state in its capacity as the sustainer of rights (and it is in this capacity that it punishes) has nothing to do with the amount of moral depravity in the criminal, and the primary reference in punishment, as inflicted

by the state, is not to the effect of the punishment on the person punished, but to its effect on others. The considerations determining its amount should be prospective rather than retrospective. In the crime a right has been violated. No punishment can undo what has been done, or make good the wrong to the person who has suffered. What it can do is to make less likely the doing of a similar wrong in other cases. Its object, therefore, is not to cause pain to the criminal for the sake of causing it, nor chiefly for the sake of preventing him, individually, from committing the crime again, but to associate terror with the contemplation of the crime in the mind of others who might be tempted to commit it. And this object, unlike that of making the pain of the punishment commensurate with the guilt of the criminal, is in the main attainable. The effect of the spectacle of punishment on the onlooker is independent of any minute inquiry into the degree to which it affects the particular criminal. The attachment of equal penalties to offenses that are alike in respect of the importance of the rights which they violate, and in respect of the ordinary temptations to them, will, on the whole, lead to the association of an equal amount of terror with the prospect of committing like offenses in the public mind. When the circumstances, indeed, of two criminals guilty of offenses alike in both the above respects are very greatly and obviously different, so different as to make the operation of the same penalty upon them very conspicuously different, then the penalty may be varied without interfering with its terrifying effect on the public mind. We will suppose, e. g., that a fraud on the part of a respectable banker is equivalent, both in respect of the rights which it violates and of the terror needed to prevent the recurrence of like offenses, to a burglary. It will not follow because the burglary is punished by imprisonment with hard labor that hard labor should be inflicted on the fraudulent banker likewise. The infliction of hard labor is in everyone's apprehension so different to the banker from what it is to the burglar, that its infliction is not needed in order to equalize the terror which the popular imagination associates with the punishment in the two cases.

194. On the same principle may be justified the consideration of extenuating circumstances in the infliction of punishment. In fact, whether under that name or another, they are taken account of in the administration of criminal law among all civ-

ilized nations. "Extenuating circumstances" is not a phrase in use among our lawyers, but in fact the consideration of them does constantly, with the approval of the judge, convert what would otherwise have been conviction for murder into conviction for manslaughter, and when there has been conviction for murder, leads to the commutation of the sentence. This fact is often taken to show that the degree of moral depravity on the part of the criminal, the question of his character and motive, is and must be considered in determining the punishment due to him. In truth, however, "extenuating circumstances" may very well make a difference in the kind of terror which needs to be associated with a crime in order to the future protection of rights, and under certain conditions the consideration of them may be sufficiently justified on this ground. Suppose a theft by a starving man, or a hare shot by an angry farmer whose corn it is devouring. These are crimes, but crimes under such extenuating circumstances that there is no need to associate very serious terror with them in order to the protection of the essential rights of property. In the latter case the right which the farmer violates is one which perhaps might be disallowed altogether without interference with any right which society is interested in maintaining. In the former case the right violated is a primary and essential one; one which, where there are many starving people, is in fact pretty sure to be protected by the most stringent penalties. And it might be argued that on the principle stated this is as it should be; that, so far from the hunger of the thief being a reason for lightening his punishment, it is a reason for increasing it, in order that the special temptation to steal when far gone in hunger may, if possible, be neutralized by a special terror associated with the commission of the crime under those conditions. But this would be a one-sided application of the principle. It is not the business of the state to protect one order of rights specially, but all rights equally. It ought not, therefore, to protect a certain order of rights by associating special terror with the violation of them, when the special temptation to their violation itself implies a violation of right in the persons of those who are so tempted, as is the case when a general danger to property arises from the fact that many people are on the edge of starvation. The attempt to do so is at once ineffectual and diverts attention from the true way of protecting the endangered right, which is to prevent people from falling

into a state of starvation. In any tolerably organized society the condition of a man ordinarily honest and industrious, who is driven to theft by hunger, will be so abnormal that very little terror needs to be associated with the crime as so committed in order to maintain the sanctity of property in the general imagination. Suppose again a man to be killed in a quarrel arising out of his having tampered with the fidelity of his neighbor's wife. In such a case "extenuating circumstances" may fairly be pleaded against the infliction of the extremest penalty, because the extremist terror does not need to be associated with homicide, as committed under such conditions, in order to the general protection of human life, and because the attempt so to associate it would tend, so far as successful, to weaken the general sense of the wrong—the breach of family right—involved in the act which, in the case supposed, provokes the homicide.

195. "After all," it may be said, "this is a far-fetched way of explaining the admission of extenuating circumstances as modifying the punishment of crime. Why so strenuously avoid the simpler explanation, that extenuating circumstances are taken into account because they are held to modify the moral guilt of the crime? Is not their recognition a practical proof that the punishment of a crime by the state represents the moral disapproval of the community? Does it not show that, however imperfectly the amount of punishment inflicted on a crime may in fact correspond to its moral wickedness, it is generally felt that it ought to do so?"

196. The answer is that there are two reasons for holding that the state neither can nor should attempt to adjust the amount of punishment which it inflicts on a crime to the degree of moral depravity which the crime implies. (1) That the degree of moral depravity implied in any crime is unascertainable. It depends on the motive of the crime, and on this as part of the general character of the agent; on the relation in which the habitual set of his character stands to the character habitually set on the pursuit of goodness. No one can ascertain this in regard to himself. He may know that he is always far from being what he ought to be; that one particular action of his represents on the whole, with much admixture of inferior motives, the better tendency; another, with some admixture of better motives, the worse. But any question in regard to the degree of moral goodness or badness in any action of his own or of his most

intimate friend is quite unanswerable. Much less can a judge or jury answer such a question in regard to an unknown criminal. We may be sure, indeed, that any ordinary crime—nay, perhaps, even that of the "disinterested rebel"—implies the operation of some motive which is morally bad, for though it is not necessarily the worst men who come into conflict with established rights, it probably never can be the best; but the degree of badness implied in such a conflict in any particular case is quite beyond our ken, and it is this degree that must be ascertained if the amount of punishment which the state inflicts is to be proportionate to the moral badness implied in the crime. (2) The notion that the state should, if it could, adjust the amount of punishment which it inflicts on a crime to the moral wickedness of the crime, rests on a false view of the relation of the state to morality. It implies that it is the business of the state to punish wickedness, as such. But it has no such business. It cannot undertake to punish wickedness, as such, without vitiating the disinterestedness of the effort to escape wickedness, and thus checking the growth of a true goodness of the heart in the attempt to promote a goodness which is merely on the surface. This, however, is not to be understood as meaning that the punishment of crime serves no moral purpose. It does serve such a purpose, and has its value in doing so, but only in the sense that the protection of rights, and the association of terror with their violation, is the condition antecedent of any general advance in moral well-being.

197. The punishment of crime, then, neither is, nor can, nor should be adjusted to the degree of moral depravity, properly so-called, which is implied in the crime. But it does not, therefore, follow that it does not represent the disapproval which the community feels for the crime. On the whole, making allowance for the fact that law and judicial custom vary more slowly than popular feeling, it does represent such disapproval. And the disapproval may fitly be called moral, so far as that merely means that it is a disapproval relating to voluntary action. But it is a disapproval founded on a sense of what is necessary for the protection of rights, not on a judgment of good and evil of that kind which we call conscience, when it is applied to our own actions, and which is founded on an ideal of moral goodness with which we compare our inward conduct ("inward," as representing motives and character). It is founded

essentially on the outward aspect of a man's conduct, on the view of it as related to the security and freedom in action and acquisition of other members of society. It is true that this distinction between the outward and inward aspects of conduct is not present to the popular mind. It has not been recognized by those who have been the agents in establishing the existing law of crimes in civilized nations. As the state came to control the individual or family in revenging hurts, and to substitute its penalties for private vengeance, rules of punishment came to be enacted expressive of general disapproval, without any clear consciousness of what was the ground of the disapproval. But in fact it was by what have been just described as the outward consequences of conduct that a general disapproval of it was ordinarily excited. Its morality in the stricter or inward sense was not matter of general social consideration. Thus in the main it has been on the ground of its interference with the general security and freedom in action and acquisition, and in proportion to the apprehension excited by it in this respect, that conduct has been punished by the state. Thus the actual practice of criminal law has on the whole corresponded to its true principle. So far as this principle has been departed from, it has not been because the moral badness of conduct, in the true or inward sense, has been taken account of in its treatment as a crime, for this has not been generally contemplated at all, but because "religious" considerations have interfered. Conduct which did not call for punishment by the state as interfering with any true rights (rights that should be rights) has been punished as "irreligious." This, however, did not mean that it was punished on the ground of moral badness, properly so-called. It meant that its consequences were feared either as likely to weaken the belief in some divine authority on which the established system of rights was supposed to rest, or as likely to bring evil on the community through provoking the wrath of some unseen power.

198. This account of the considerations which have regulated the punishment of crimes explains the severity with which "criminal negligence" is in some cases punished, and that severity is justified by the account given of the true principle of criminal law, the principle, viz., that crime should be punished according to the importance of the right which it violates, and to the degree of terror which, in a well-organized society, needs to be associated with the crime in order to the protection of the right.

It cannot be held that the carelessness of an engine-driver who overlooks a signal and causes a fatal accident, implies more moral depravity than is implied in such negligence as all of us are constantly guilty of. Considered with reference to the state of mind of the agent, it is on a level with multitudes of actions and omissions which are not punished at all. Yet the engine-driver would be found guilty of manslaughter and sentenced to penal servitude. The justification is not to be found in distinctions between different kinds of negligence on the part of different agents, but in the effect of the negligence in different cases upon the rights of others. In the case supposed, the most important of all rights, the right to life, on the part of railway passengers depends for its maintenance on the vigilance of the drivers. Any preventable failure in such vigilance requires to have sufficient terror associated with it in the mind of other engine-drivers to prevent the recurrence of a like failure in vigilance. Such punishment is just, however generally virtuous the victim of it is, because it is necessary to the protection of rights of which the protection is necessary to social well-being; and the victim of it, in proportion to his sense of justice, which means his habit of practically recognizing true rights, will recognize it as just.

199. On this principle crimes committed in drunkenness must be dealt with. Not only is all depravity of motive specially inapplicable to them, since the motives actuating a drunken man often seem to have little connection with his habitual character; it is not always the case that a crime committed in drunkenness is even intentional. When a man in a drunken rage kills another, he no doubt intends to kill him, or at any rate to do him "grievous bodily harm," and perhaps the association of great penal terror with such an offense may tend to restrain men from committing it even when drunk; but when a drunken mother lies on her child and smothers it, the hurt is not intentional but accidental. The drunkenness, however, is not accidental, but preventable by the influence of adequate motives. It is therefore proper to treat such a violation of right, though committed unknowingly, as a crime, and to associate terror with it in the popular imagination, in order to the protection of rights by making people more careful about getting drunk, about allowing or promoting drunkenness, and about looking after drunken people. It is unreasonable, however, to do this and at the

same time to associate so little terror, as in practice we do, with the promotion of dangerous drunkenness. The case of a crime committed by a drunkard is plainly distinguishable from that of a crime committed by a lunatic, for the association of penal terror with the latter would tend neither to prevent a lunatic from committing a crime nor people from becoming lunatics.

200. The principle above stated, as that according to which punishment by the state should be inflicted and regulated, also justifies a distinction between crimes and civil injuries, i. e., between breaches of right for which the state inflicts punishment without redress to the person injured, and those for which it procures or seeks to procure redress to the person injured without punishment of the person causing the injury. We are not here concerned with the history of this distinction (for which see Maine, *Ancient Law*, chap. x, and W. E. Hearn, *The Aryan Household*, chap. xix), nor with the question whether many breaches of right now among us treated as civil injuries ought not to be treated as crimes, but with the justification that exists for treating certain kinds of breach of right as cases in which the state should interfere to procure redress for the person injured, but not in the way of inflicting punishment on the injurer until he wilfully resists the order to make redress. The principle of the distinction as ordinarily laid down, viz., that civil injuries "are violations of rights when considered in reference to the injury sustained by the individual," while crimes are "violations of rights when considered in reference to their evil tendency as regards the community at large" (Stephen, Book V, chap. i), is misleading; for if the well-being of the community did not suffer in the hurt done to the individual, that hurt would not be a violation of a right in the true sense at all, nor would the community have any ground for insisting that the hurt shall be redressed, and for determining the mode in which it shall be redressed. A violation of right cannot in truth be considered merely in relation to injury sustained by an individual, for, thus considered, it would not be a violation of right. It may be said that the state is only concerned in procuring redress for civil injuries, because, if it left an individual to procure redress in his own way, there would be no public peace. But there are other and easier ways of preventing fighting than by procuring redress of wrong. We prevent our dogs from fighting, not by redressing wrongs which they sustain from each other (of

wrongs as of rights they are in the proper sense incapable), but by beating them or tying them up. The community would not keep the peace by procuring redress for hurt or damage sustained by individuals, unless it conceived itself as having interest in the security of individuals from hurt and damage, unless it considered the hurt done to individuals as done to itself. The true justification for treating some breaches of right as cases merely for redress, others as cases for punishment, is that, in order to the general protection of rights, with some it is necessary to associate a certain terror, with others it is not.

201. What, then, is the general ground of distinction between those with which terror does, and those with which it does not, need to be associated? Clearly it is purposeless to associate terror with breaches of right in the case where the breaker does not know that he is violating a right, and is not responsible for not knowing it. No association of terror with such a breach of right can prevent men from similar breaches under like conditions. In any case, therefore, in which it is to begin with, open to dispute whether a breach of right has been committed at all, e. g., when it is a question whether a contract has been really broken, owing to some doubt as to the interpretation of the contract or its application to a particular set of circumstances, or whether a commodity of which someone is in possession properly belongs to another,—in such a case, though the judge finally decides that there has been a breach of right, there is no ground for treating it as a crime or punishing it. If, in the course of judicial inquiry, it turns out that there has been fraud by one or other of the parties to the litigation, a criminal prosecution, having punishment, not redress, for its object, should properly supervene upon the civil suit, unless the consequences of the civil suit are incidentally such as to amount to a sufficient punishment of the fraudulent party. Again, it is purposeless to associate terror with a breach of obligation which the person committing it knows to be a breach, but of an obligation which he has no means of fulfilling, e. g., non-payment of an acknowledged debt by a man who, through no fault of his own, is without means of paying it. It is only in cases of one or other of the above kinds,—cases in which the breach of right, supposing it to have been committed, has presumably arisen either from inability to prevent it or from ignorance of the existence of the right,—that it can be held as an absolute rule to be no

business of the state to interfere penally but only in the way of restoring, so far as possible, the broken right.

202. But there are many cases of breach of right which can neither be definitely reduced to one of the above kinds, nor distinguished from them by any broad demarcation; cases in which the breaker of a right has been ignorant of it, because he has not cared to know, or in which his inability to fulfil it is the result of negligence or extravagance. Whether these should be treated penally or not, will depend partly on the seriousness of the wrong done through avoidable ignorance or negligence, partly on the sufficiency of the deterrent effect incidentally involved in the civil remedy. In the case e. g. of inability to pay a debt through extravagance or recklessness, it may be unnecessary and inadvisable to treat the breach of right penally, in consideration that it is indirectly punished by poverty and the loss of reputation incidental to bankruptcy, and the creditors should not look to the state to protect them from the consequences of lending on bad security. The negligence of a trustee, again, may be indirectly punished by his being obliged to make good the property lost through his neglect to the utmost of his means. This may serve as a sufficiently deterrent example without the negligence being proceeded against criminally. Again, damage done to property by negligence is in England dealt with civilly, not criminally; and it may be held that in this case the liability to civil action is a sufficient deterrent. On the other hand, negligence which, as negligence, is not really distinguishable from the above, is rightly treated criminally when its consequences are more serious; e. g., that of the railway servant whose negligence results in a fatal accident, that of the bank director who allows a misleading statement of accounts to be published, fraudulently perhaps in the eye of the law, but in fact negligently. As a matter of principle, no doubt, if intentional violation of the right of property is treated as penal equally with the violation of the right of life, the negligent violation should be treated as penal in the one case as much as in the other. But as the consequences of an action for damages may be virtually though not ostensibly penal to the person proceeded against, it may be convenient to leave those negligences which do not, like the negligence of a railway servant, affect the most important rights, or do not affect

rights on a very large scale as those that of a bank director, to be dealt with by the civil process.

203. The actual distinction between crimes and civil injuries in English law is no doubt largely accidental. As the historians of law point out, the civil process, having compensation, not punishment, for its object, is the form which the interference of the community for the maintenance of rights originally takes. The community, restraining private vengeance, helps the injured person to redress, and regulates the way in which redress shall be obtained. This procedure no doubt implies the conviction that the community is concerned in the injury done to an individual, but it is only by degrees that this conviction becomes explicit, and that the community comes to treat all preventable breaches of right as offenses against itself or its sovereign representative; i. e., as crimes or penal; in the language of English law, "as breaches of the king's peace." Those offenses are first so treated which happen to excite most public alarm, most fear for general safety (hence, among others, anything thought sacrilegious). In a country like England, where no code has been drawn up on general principles, the class of injuries that are treated penally is gradually enlarged as public alarm happens to be excited in particular directions, but it is largely a matter of accident how the classification of crimes on one side and civil injuries on the other happens to stand at any particular time.[6]

204. According to the view here taken, then, there is no direct reference in punishment by the state, either retrospective

[6]See Markby, Elements of Law, chap. xi, especially note 1, p. 243; and Austin, Lecture XXVII. Between crimes and civil injuries the distinction, as it actually exists, is merely one of procedure (as stated by Austin, p. 518). The violation of right in one case is proceeded against by the method of indictment, in the other by an "action." The distinction that in one case punishment is the object of the process, in the other redress, is introduced in order to explain the difference of procedure; and to justify this distinction resort is had to the further distinction, that civil injury is considered to affect the individual merely, crime to affect the state. But in fact the action for civil injury may incidentally have a penal result (Austin, p. 521), and if it had not, many violations of right now treated as civil injuries would have to be treated as crimes. As an explanation therefore of the distinction between crimes and injuries as it stands, it is not correct to say that for the former punishment is sought, for the latter merely redress. Nor for reasons already given is it true of any civil injury to say that it affects, or should be considered as affecting, injured individuals *merely*. The only distinction of principle is that between violations of right which call for punishment and those which do not; and those only do not call for punishment in some form or other which arise either from uncertainty as to the right violated, or from inability to prevent the violation.

or prospective, to moral good or evil. The state in its judicial action does not look to the moral guilt of the criminal whom it punishes, or to the promotion of moral good by means of his punishment in him or others. It looks not to virtue and vice, but to rights and wrongs. It looks back to the wrong done in the crime which it punishes; not, however, in order to avenge it, but in order to the consideration of the sort of terror which needs to be associated with such wrongdoing in order to the future maintenance of rights. If the character of the criminal comes into account at all, it can only be properly as an incident of this consideration. Thus punishment of crime is preventive in its object; not, however, preventive of any or every evil and by any and every means, but (according to its idea or as it should be) *justly* preventive of *injustice;* preventive of interference with those powers of action and acquisition which it is for the general well-being that individuals should possess, and according to laws which allow those powers equally to all men. But in order effectually to attain its preventive object and to attain it justly, it should be reformatory. When the reformatory office of punishment is insisted on, the reference may be, and from the judicial point of view must be, not to the moral good of the criminal as an ultimate end, but to his recovery from criminal habits as a means to that which is the proper and direct object of state punishment, viz., the general protection of rights. The reformatory function of punishment is from this point of view an incident of its preventive function, as regulated by the consideration of what is just to the criminal as well as to others. For the fulfilment of this latter function, the great thing, as we have seen, is by the punishment of an actual criminal to deter other possible criminals; but for the same purpose, unless the actual criminal is to be put out of the way or locked up for life, it must be desirable to reform him so that he may not be dangerous in future. Now when it is asked why he should not be put out of the way, it must not be forgotten that among the rights which the state has to maintain are included rights of the criminal himself. These indeed are for the time suspended by his action in violation of rights, but founded as they are on the capacity for contributing to social good, they could only be held to be finally forfeited on the ground that this capacity was absolutely extinct.

205. This consideration limits the kind of punishment

which the state may justly inflict. It ought not in punishing to sacrifice unnecessarily to the maintenance of rights in general what might be called the reversionary rights of the criminal, rights which, if properly treated, he might ultimately become capable of exercising for the general good. Punishment therefore either by death of by perpetual imprisonment is justifiable only on one of two grounds; either that association of the extremest terror with certain actions is under certain conditions necessary to preserve the possibility of a social life based on the observance of rights, or that the crime punished affords a presumption of a permanent incapacity for rights on the part of the criminal. The first justification may be pleaded for the executions of men concerned in treasonable outbreaks, or guilty of certain breaches of discipline in war (on the supposition that the war is necessary for the safety of the state and that such punishments are a necessary incident of war). Whether the capital punishment is really just in such cases must depend, not only on its necessity as an incident in the defense of a certain state, but on the question whether that state itself is fulfilling its function as a sustainer of true rights. For the penalty of death for murder both justifications may be urged. It cannot be defended on any other ground, but it may be doubted whether the presumption of permanent incapacity for rights is one which in our ignorance we can ever be entitled to make. As to the other plea, the question is whether, with a proper police system and sufficient certainty of detection and conviction, the association of this extremest terror with the murderer is necessary to the security of life. Where the death penalty, however, is unjustifiable, so must be that of really permanent imprisonment; one as much as the other is an absolute deprivation of free social life, and of the possibilities of moral development which that life affords. The only justification for a sentence of permanent imprisonment in a case where there would be none for capital punishment would be that, though inflicted as permanent, the imprisonment might be brought to an end in the event of any sufficient proof appearing of the criminal's amendment. But such proof could only be afforded if the imprisonment where so modified as to allow the prisoner a certain amount of liberty.

206. If punishment then is to be just, in the sense that in its infliction due account is taken of all rights, including

the suspended rights of the criminal himself, it must be, so far as public safety allows, reformatory. It must tend to qualify the criminal for the resumption of rights. As reformatory, however, punishment has for its direct object the qualification for the exercise of rights, and is only concerned with the moralization of the criminal indirectly so far as it may result from the exercise of rights. But even where it cannot be reformatory in this sense, and over and above its reformatory function in cases where it has one, it has a moral end. Just because punishment by the state has for its direct object the maintenance of rights, it has, like every other function of the state, indirectly a moral object, because true rights, according to our definition, are powers which it is for the general well-being that the individual (or association) should possess, and that well-being is essentially a moral well-being. Ultimately, therefore, the just punishment of crime is for the moral good of the community. It is also for the moral good of the criminal himself, unless—and this is a supposition which we ought not to make—he is beyond the reach of moral influences. Though not inflicted for that purpose, and though it would not the less have to be inflicted if no moral effect on the criminal could be discerned, it is morally the best thing that can happen to him. It is so, even if a true social necessity requires that he be punished with death. The fact that society is obliged so to deal with him affords the best chance of bringing home to him the anti-social nature of his act. It is true that the last utterances of murderers generally convey the impression that they consider themselves interesting persons, quite sure of going to heaven; but these are probably conventional. At any rate, if the solemn infliction of punishment on behalf of human society, and without any sign of vindictiveness, will not breed the shame which is the moral new birth, presumably nothing else within human reach will.